

No Case for Legal Interventionism: Defending Democracy Through Protecting Pluralism and Parliamentarism

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Being a democrat means accepting that the law is not a very durable sword against authoritarianism. Democratic law bends and submits to the majority. When push comes to shove, it lacks the capacity to defy anti-democratic, authoritarian majorities. Of course, this does not mean that legal mechanisms and instruments are meaningless in this context. They can work against and impede the rise of anti-pluralist, illiberal and anti-democratic political movements. But it is important to acknowledge that legal interventions and prohibitive measures that target anti-liberal, anti-democratic political platforms also pose risks. They may undermine what they are supposed to protect: a free and egalitarian political process that is based on open political competition, pluralism and a free public discourse.

Yet, there are different approaches to safeguarding democracy by means of law, and they merit differentiated evaluation. In what follows, I will critically address some salient strategies. To hint at my conclusion: Structurally empowering and protecting parliamentarism, effective opposition, and, in general, political pluralism, seems to be the most promising and unambiguous way of making democracy (more) resistant to authoritarian erosion. But one caveat is due: The structural dimensions of protecting democracy must not in any sense draw away the focus from the social, economic and cultural issues and prerequisites of democracy. There are cultural, societal and economic aspects of democracy that cannot be maintained by legal means at all.

What's wrong with prohibitive measures and legal interventions in the political process?

There is a number of legal interventions that seem like robust, effective measures against illiberal, anti-democratic political action: bans of political parties and associations; restrictions of speech; rules that exclude authoritarian platforms from public funding of parties and electoral campaigning or the use of public infrastructures, including media. Yet, such measures of a "Militant Democracy" are problematic in that they conflict with constituent principles of democracy: Legal sanctions and interventions that address activity because of its political content ("viewpoint-based measures") have an illiberal, non-egalitarian and anti-pluralist thrust. They are prone to partisan misuse and can have broader chilling effects on the use of democratic and liberal rights. But more importantly, they might not even be effective: A political movement targeted by prohibitive measures can find

alternative routes for political action. If in any sense relevant, it will very likely be absorbed by other/new organizations. A case in point are the measures of militant democracy that German political institutions addressed at the NPD: A lot of time and resources have been spent on trying to ban the NPD. After this battle was lost twice before the Constitutional Court, a super-majority then changed the Grundgesetz to at least cut off the NPD from public funding. But all this did evidently not prevent the ascent of a new right-to-extreme-right party: The AfD has proven to be relatively effective in absorbing the right-wing political current within German society that is worryingly on the rise.

Is constitutionalizing democratic and liberal policies a good idea?

Erecting procedural obstacles to the implementation of anti-democratic, illiberal policies seems like another promising safeguard of democracy against authoritarian majorities. Constitutional law can entrench democratic and liberal policies by procedural means: If substantive policies get enshrined in the constitution, adopting amendments will be subject to super-majoritarian thresholds (such as a two-thirds majority requirement). But there are other forms of (relative) procedural entrenchment as well: Constitutional law can provide for inter-institutional checks on parliamentarism (for example a bicameral legislature and presidential veto powers) and judicial review of legislation, giving the judiciary the power to veto laws. All these mechanisms accomplish constitutionalization in the sense that they withdraw the subject matters to which they apply from pure majoritarian decision-making. They require political consensus beyond the governing majority, across partisan lines and/or across the branches of government. All this can limit the capacities of authoritarian majorities to damage a democratic order.

Elections are at the center of contemporary democratic political systems. Therefore, at first sight, the body of rules that guarantee egalitarian and free elections is a plausible candidate for constitutionalization. If, in the German context, the Grundgesetz would contain the rules governing elections, a (double) two-thirds majority would be needed for amendments. Yet, constitutionalizing the electoral regime is, for a number of reasons, not a simple and unambiguous thing to do. First of all, constitutionalization is hard to realize for political subject matters that are politically contentious, as election laws are: They shape the outcomes of political competition and trigger conflicting strategic interests of political parties. Therefore, the broad consensus required to constitutionally entrench concrete electoral rules may very well not be achievable in the first place. But even if such a consensus could be realized, a crucial question remains: To what extent should the electoral system be enshrined in the constitution? Exactly *which aspects* to put into the constitution, and which not? This issue has no obvious solution, it is political in itself. At the same time, it has wide-ranging implications in that constitutionalization can also have problematic effects: It diminishes adaptability. Any electoral system one may want to constitutionalize for protective reasons can in the future produce unwanted, problematic consequences. Depending on the – unpredictable – development of the political landscape, a previously functional electoral system

may generate inegalitarian outcomes (such as *Überhangmandate* and *negatives Stimmgewicht*).

But in any case, constitutionalizing substantive policies has general downsides: Super-majoritarian requirements and counter-majoritarian veto powers come at the expense of open and egalitarian political decision-making, for which majority rule is indispensable. They increase the power of the judiciary, which exercises an elitist way of political control and is not immune to politicization. And they decrease the capacity of the political system to act – to pass laws, most importantly. Depending on political circumstances, they can, in the worst case, create gridlock. Yet, salient cases of ineffectiveness may undermine citizens' confidence and trust in the political system as a whole and fuel anti-system sentiments. Constitutionalization thus has some potential to weaken the very thing that it is supposed to protect: a functioning democracy.

How to protect fair, egalitarian and pluralist political competition?

Constitutionalization is neither an unambiguous nor a readily available way to protect a democratic electoral system. But maintaining fair, open and egalitarian political competition is nonetheless crucial for democracy – and the electoral system is clearly one of its most vulnerable spots: Hungary and Poland illustrate the many ways in which electoral laws may be amended, deregulated or applied to disadvantage political opponents of anti-pluralist, illiberal movements. In general, in the hands of partisan actors, legal standards and oversight procedures in the field of elections, party regulation and party financing may be applied in a politicized way and beyond their legitimate functions. Institutions tasked with administration and oversight of elections and party regulation have shown to be a relatively easy target for partisan capture and misuse. Therefore, it is worthwhile considering whether the German institutions in this field are well-designed to resist capture. Two institutions seem especially vulnerable with a view to partisan capture: Firstly, the *Bundeswahlleiter* (Federal Elections Officer), who supervises the organization and conduct of elections to the Bundestag, determines and announces the general election result, verifies the proper election conduct, etc. and appoints the Federal Electoral Committee, which handles other aspects of the administration of elections. The *Bundeswahlleiter* is appointed by the Federal Minister of the Interior, who, as matter of convention, will select the President of the Federal Statistical Office. Secondly and equally sensitive, oversight of party finances and financing is the responsibility of one actor: The President of the Bundestag. In both cases, oversight of crucial aspects of fair, egalitarian and pluralist political competition is exercised under the direction of the ruling majority: In the case of the *Bundeswahlleiter*, it is a representative of the ruling political majority (the minister) who chooses a single officer to direct the supervision of federal elections. The President of the Bundestag, who oversees party finances and financing, is a parliamentarian representing the largest political group in parliament. In both cases, the task requires non-partisan, fair exercise by the incumbent, who is either a politician him- or herself, or singlehandedly selected by a politician. In depending on non-partisan, *bona fide*

conduct by political actors, the oversight regime as it stands is evidently vulnerable to partisan capture.

Oversight procedures in the field of political competition can hardly be made bullet-proof against being politicized. But monocratic, majoritarian institutions such as the *Bundeswahlleiter* and the President of the Bundestag form a particular easy target for partisan misuse. Pluralist institutions that represent the diversity of political platforms and require cross-partisan consensus seem much more robust in resisting authoritarian majorities.

Defending democracy through parliamentarism

Parliaments are essential for democratic government: They represent political pluralism and disagreement and contribute to politicizing and checking on executive action. Safeguarding effective parliamentarism is an important aspect of protecting democracy against anti-democratic, illiberal movements on the rise. The advantage of protecting democracy through parliamentarism is that it does not require prohibitive measures and viewpoint-based interventions. Rather, it is mainly about procedural and institutional guarantees of political pluralism and the publicity of executive action. Parliamentarism indispensably requires opposition rights: The opposition has to be guaranteed the right to participate in all parliamentary activity, to present political alternatives and to challenge the majority. To be effective and robust, these rights must be independent from the majority's consent.

Making parliamentarism (more) resistant against authoritarian capture has a number of dimensions, only two of which I can highlight here. The first sensitive issue is the regulation of parliamentary speech and action by the opposition, especially the governance of parliamentary debates and disciplinary measures. Generally, parliamentary speech needs to be protected and immune from interference based on a judgment of content. Moreover, to fulfill its democratic function, the opposition has to be guaranteed the right to put issues on the agenda for plenary debate without depending on the majority's consent, especially amendments and alternative proposals to majority bills. Again, with regard to protecting the parliamentary opposition, institutional issues are crucial. If majoritarian actors exercise wide discretionary power with regard to formally determining the parliament's agenda, chairing parliamentary debates and maintaining order, this depends on *bona fide* conduct and is especially vulnerable to partisan misuse. If these tasks are in the hand of majoritarian actors, such as the House Speaker/President of the Parliament, this would give *mala fide* majorities effective power to target the opposition with oppressive measures. Therefore, at least recourse to pluralist instead of majoritarian parliamentary institutions should be guaranteed.

The second issue is parliamentary scrutiny of executive action. This concerns the opposition's right to demand from the government information about its action, internal functioning and decision-making, and to conduct formal parliamentary investigations. Opposition rights to information make executive action public and facilitate democratic control. But they also work as a safeguard for the rule of law: The duty to disclose conduct can have preventive effects with regard to abuse

of powers and misconduct in general. These are important aspects of effective parliamentarism in general. But they become even more important with a view to the rise of anti-democratic, illiberal political movements: Robust opposition rights to information are an indispensable resource for checking on and challenging illiberal governments. Regarding the German system, one concern in this context is that in a number of recent cases, the Federal Constitutional Court is emphasizing executive effectiveness over parliamentary control and is, in some respects, insulating the Federal Government from parliamentary scrutiny in sensitive policy areas, most importantly, the activity of the secret services. But more generally, a comprehensive duty of the executive to disclose conduct is indispensable in upholding its accountability through parliamentary debate and public discourse. Other concerns in this context are constitutional and statutory thresholds for conducting and enforcing parliamentary investigations. There is a number of constellations in which legal thresholds for opposition rights can effectively render the opposition incapable of acting independently. If the opposition is becoming more politically fragmented, opposition groups may in practice (no longer) be able to coordinate to jointly reach quantitative thresholds for the exercise of opposition rights. Constitutional and statutory thresholds should therefore be reconsidered with a view to guaranteeing effective opposition under changing political circumstances.

On a generalized level, one thing is worth emphasizing: With regard to safeguarding parliamentarism, it is essential to play by the rules in the first place. This means upholding the full spectrum of opposition rights when anti-establishment parties like the AfD form part of the opposition. Departing from the guarantees and rights of effective opposition evidently sets bad precedent and may further fuel anti-establishment sentiments. But – last not least – it is itself damaging to democracy, which includes the idea that an open, pluralist and truly *political* discourse in parliament and beyond will sort things out.

Maintaining democracy as political task

Altogether, maintaining democracy seems to be a political and societal task much more than a task for legal interventionism. Legal interventions may be overestimated as a tool for safeguarding democracy. Prohibitive measures and sanctions that target anti-democratic, illiberal platforms (“Militant Democracy”) have an anti-pluralist thrust themselves, are not immune to misuse, and may in practice not be effective in the first place. Also, they are not able to address the subtler erosions of democracy: partisan and societal polarization, derogatory rhetoric and animus, growing distrust in and discrediting of political institutions, social and economic disparities and exclusion, etc. Political culture and societal identification with and investment in democracy cannot at all be held up by way of legal means.

Maybe democratic constitutions could and should – ahead of acute crises – systematically be made subject to simulated stress-tests. A stress-test could confront the institutional and procedural structures of the political system with concrete scenarios of a changing political landscape in which anti-democratic, authoritarian currents are on the rise and eventually gaining a majority. This would allow for a well-informed diagnosis of structural vulnerabilities and help identify possible

remedies. My best guess is that such analytical thought-experiments may hint at the importance of one particular factor: Robust, effective political pluralism. Pluralist structures protect political opposition and facilitate resistance to authoritarian erosions that a democratic system may have to face. Therefore, proactively and robustly protecting the political agency of diverse and dissenting political platforms and preferences throughout the political system seems crucial. This requires institutional and procedural guarantees, some of which have been sketched out here. Most importantly, it entails empowering and protecting parliamentarism and effective opposition. This could at least help to make democracy more resistant to anti-democratic, illiberal developments.

